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SUPREME COURT OF THE UNITED STATES

October Term, 1953

No. 570

C. CLARENCE KASKEL, a Taxpayer of the City of New York,
Petitioner,

against

VINCENT R. IMPELLITTERI, as Mayor of the City of New York, LAZARUS JOSEPH, as Comptroller of the City of New York, RUDOLPH HALLEY, as President of the City Council of the City of New York, ROBERT F. WAGNER, JR., as President of the Borough of Manhattan, JOHN CASHMORE, as President of the Borough of Brooklyn, JAMES J. LYONS, as President of the Borough of the Bronx, JAMES A. LUNDY, as President of the Borough of Queens, THOMAS F. REILLY, JR., as Acting President of the Borough of Richmond, constituting the Board of Estimate of the City of New York, and THE CITY OF NEW YORK,
Respondents,

and

TRIBOROUGH BRIDGE AND TUNNEL AUTHORITY,
Intervenor-Respondent.

BRIEF FOR INTERVENOR-RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ANDREW J. SCHOEN,
Of Counsel.

STATUTES:

PAGE

Constitution of The United States:
Fifth Amendment 4, 5
Fourteenth Amendment 4, 5, 7

Constitution of The State of New York:
Article XVIII, Section 1 .....2, 3, 4, 11

Title 28 U. S. Code:
Section 1257 2

Title 42 U. S. Code:
Sections 1451-1460 4

General Municipal Law of The State of New York, Section 72K 2, 3, 4, 5, 11

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OPINIONS BELOW

The opinion of the Supreme Court of the State of New York (R. 60-71)* is not officially reported; it appears unofficially in 121 N. Y. Supp. 848. The Appellate Division,

* References in parentheses are to the pages of the record.

First Department unanimously affirmed without opinion. See 281 App. Div. 962. The opinion of the Court of Appeals of the State of New York (R. 88-92) and the dissenting opinion (R. 88-106) are reported at 306 N. Y. 73.

JURISDICTION

Jurisdiction is predicated by petitioner on 28 U. S. C. Section 1257.

QUESTION PRESENTED

It is our position that petitioner has abandoned the only constitutional question which he sought to raise below and that he raises no substantial federal constitutional question here.

The question is whether the taking of petitioner's property, found by duly constituted public authorities to be in an insanitary and substandard area, for clearance and rehabilitation is unconstitutional

(a) because the rehabilitation (by which the area would be rendered no longer substandard or insanitary) is to be accomplished by the erection of, what petitioner terms, high rent apartment houses by private investors and of a coliseum by intervenor-respondent, a public agency; or

(b) because the judgment below dismissed the complaint on the basis of motions addressed to the face thereof and for summary judgment (supported and opposed by affidavits) without granting petitioner a trial in which he would have the opportunity to present evidence.

STATUTES INVOLVED

The pertinent constitutional and statutory provisions are Section 1 of Article XVIII of the Constitution of the State of New York and Section 72-k of the General Municipal Law of the State of New York which are set forth in the Appendix annexed to this brief, pages 15 to 17, *infra*.

STATEMENT

(a) Petitioner, a taxpayer, attacks the right of respondent-City of New York to condemn real property in an area bounded by Sixtieth Street, Eighth Avenue, Columbus Avenue and Fifty-eighth Street, in the Borough of Manhattan, City of New York for the purpose of clearing and rehabilitating same. Hereinafter the rehabilitation program with respect to this area, sometimes described as the "Columbus Circle Slum Clearance Project", will be referred to as "the Project".

(b) Respondents here are the City of New York and the individuals constituting its Board of Estimate.

(c) Respondent City derives its authority to proceed with the condemnation of the real property in the Project area here involved from Article XVIII, Section 1 of the Constitution of the State of New York and Section 72-k of the General Municipal Law of the State of New York.

Section 72-k empowers respondent City to condemn real property where necessary or incidental to clearance and rehabilitation of "substandard and insanitary areas". Respondent City may sell the property so condemned at public auction for the purpose of the clearance and rehabilitation by the purchaser thereof. The deed conveying such property must contain (i) provisions requiring the purchaser to clear the property and rehabilitate it in such manner as respondent Board of Estimate prescribes and (ii) provisions insuring the use of such property for purposes consistent with clearance and rehabilitation of substandard and insanitary areas.

Respondent City may acquire such real property only with the prior consent of and finding by the City Planning Commission that such acquisition is necessary for the clearance and neighborhood rehabilitation of real property in a substandard and insanitary area.

Section 72-k also authorizes respondent City to apply for and accept financial assistance from the federal government as provided in Title I of the National Housing Act of 1949 (42 U. S. C. 1451-1460).

(d) The complaint herein alleges the steps taken by respondent City to condemn the property in the Project area and shows (R. 19-21) that the City Planning Commission, after a public hearing, made the finding and gave the consent required by Section 72-k (R. 17-19)* (see p. 3 above). It also shows that respondent Board of Estimate made a similar finding (R. 19, Exh. C to the complaint).

After describing the action taken by respondent City to condemn the property in the Project area, the complaint alleges that the condemnation deprives petitioner of his rights under the Constitution of the United States for the following reasons:

(i) Section 72-k of the General Municipal Law violates the Fifth and Fourteenth Amendments to the Constitution of the United States (R. 21-22).

(ii) Section 1 of Article XVIII of the Constitution of the State of New York, if it is construed to authorize Section 72-k of the General Municipal Law and the condemnation thereunder of private property for resale for private use, violates the Fifth and Fourteenth Amendments to the Constitution of the United States (R. 22).

(iii) Section 72-k of the General Municipal Law fails to provide any standards or safeguards for the public's protection in connection with clearance and rehabilitation of substandard and insanitary areas and is therefore unconstitutional and void (R. 22).

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* The complaint has annexed thereto, as Exhibit A, the Report of the City Planning Commission which shows such finding. This Exhibit as well as all the others annexed to the complaint have not been printed in the record, but are to be filed, pursuant to stipulation between the parties (R. 108).

(iv) The Project area is not a substandard and insanitary area and any finding, consent or report by the respondents that it is a substandard and insanitary area is unreasonable, arbitrary, capricious and illegal and amounts to a taking of property without due process of law and is in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States (R. 22-23). In connection with this allegation, petitioner annexed as Exhibit J to the complaint a report as to the conditions in the Project area made by one William Charney Vladeck, an architect employed by petitioner (R. 23).

The constitutional issues just enumerated are the only ones set forth in the complaint.

The prayer for relief in the complaint requests that Section 72-k be adjudicated unconstitutional; that the findings of respondent Board and the City Planning Commission referred to be declared null and void; that the Project area be declared not substandard and not insanitary; and that respondent City and respondent Board be enjoined from continuing with the Project (R. 25-27).

(e) Respondents interposed an answer (R. 46-48) which admits the making of the findings referred to in the complaint but denies the allegations of illegality and unconstitutionality. It also denies that the finding of the City Planning Commission and the other public agencies that the Project area is substandard and insanitary is "unreasonable, arbitrary, capricious and illegal".

The answer alleges, as an affirmative defense (R. 47-48), that the City Planning Commission, respondent Board, the City's Slum Clearance Committee and the United States Housing and Home Finance Administrator all made findings that the Project area is substandard and insanitary and that such findings were based upon substantial factual evidence.

(f) Respondents thereafter moved to dismiss the complaint on the ground that it did not state facts sufficient

to constitute a cause of action (R. 43). They concurrently moved for summary judgment on the basis of the verified answer and a supporting affidavit (R. 44-56).

In opposition to the motion for summary judgment, petitioner interposed (R. 57-59) an affidavit and the above mentioned report of his architect (see p. 5, *supra*) which attempted to show that the Project area was not a slum and was not substandard or insanitary.

(g) The Supreme Court of New York granted respondents' motions to dismiss the complaint and for summary judgment (R. 5-8). The Appellate Division, First Department unanimously affirmed, without opinion (281 App. Div. 962) and thereafter the Court of Appeals also affirmed, two judges dissenting (R. 107).

After the judgment of the Court of Appeals was entered, petitioner moved in that Court for reargument, for a stay of the order of condemnation and for an amendment of the remittitur to show the federal question involved on the appeal. The Court of Appeals denied reargument (R. 112) and the application for the stay (R. 113), but amended the remittitur so as to add thereto the following:

> "Upon the appeal herein there was presented and necessarily passed upon a question under the Constitution of the United States, as follows: Whether the taking by the City of New York, of the properties here involved, was, on this record, a deprivation of due process under the Fourteenth Amendment. The Court of Appeals held that there was no such deprivation." (306 N. Y. 609)

(h) Thereupon, petitioner moved this Court for a stay. Petitioner's said application for a stay was denied by this Court on November 28, 1953.

The property herein involved has been condemned and title thereto became vested in respondent City pursuant to order entered on November 17, 1953. Respondent City has conveyed the property to the redevelopers for clearance and rehabilitation.

ARGUMENT

I

No Substantial Federal Constitutional Question Is Here Involved.

When petitioner, on November 28, 1953, applied in writing to this Court for a stay, Mr. Justice Jackson, who heard counsel in chambers, expressed grave doubts that any substantial federal constitutional question was present in this case. Mr. Justice Jackson's doubts were evidently shared by the entire Court because petitioner's said application was denied.

Petitioner's petition for certiorari presents the same arguments, in substance, advanced on his application for a stay and should be denied for the same reasons.

Burt v. *Pittsburgh*, 340 U. S. 802 (the facts of which appear in the record on appeal and in the jurisdictional statement in this Court) demonstrates that the cause at bar raises no substantial federal constitutional question.

The *Burt* case arose before a three-judge United States district court in Pennsylvania. Plaintiff was a taxpayer owning property in the area known as the "Golden Triangle" in the City of Pittsburgh. Her complaint alleged that, pursuant to the Urban Revelopment Law of Pennsylvania, the City of Pittsburgh sought to condemn plaintiff's and other property as "blighted areas" and to sell same to a life insurance company for clearance and redevelopment by the erection of office buildings. Her complaint stated that the area in which her property was located was not in fact "blighted", and set forth allegations and exhibits in support of her position. She therefore alleged that said Pennsylvania statute deprived her of her property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States because it permitted her property to be taken and

delivered to a private investor for the latter's private use, i.e., the erection of office buildings.

Defendants moved to dismiss her complaint on its face, which motion was granted. The three-judge United States district court, in granting the motion, stated, among other things:

> "We do not find in the plaintiff's complaint and the exhibits attached thereto anything to indicate that the statutes themselves or the action of the constituted authorities in carrying them out violated plaintiff's constitutional rights under the Constitution of the United States."

On plaintiff's appeal to this Court in the *Burt* case, defendants moved to affirm the judgment on the ground that no substantial constitutional question was involved. This Court granted that motion (340 U. S. at 802), stating, "Per Curiam":

> "The motion to affirm is granted and the judgment is affirmed."

The *Burt* case is directly in point. Every issue here sought to be raised was there involved. In that case, plaintiff sought a trial on the issue of whether her property was in a "blighted" area. She claimed the right to call witnesses who would disprove the expert opinion of the Pittsburgh Planning Commission which had made a finding that the area was blighted. So here, petitioner claims he is entitled to a trial at which he would try to disprove the finding made by the City Planning Commission of New York that the Columbus Circle area is substandard and insanitary and that the condemnation thereof is necessary for its rehabilitation and at which he would try to show that the condemnation is not for slum clearance purposes.

In the *Burt* case, plaintiff alleged that her property was being taken for redevelopment in the form of office buildings, and therefore that her property was being taken without due process. So here, petitioner contends that his

building is being condemned for the erection of high cost apartment buildings and for a coliseum.

Petitioner here cannot point to a single issue in the cause at bar which was not involved in the *Burt* case.

It is submitted that no substantial constitutional question is here involved anymore than in the *Burt* case.

II

There Was No Disagreement Between The Majority And Minority Of The Court Of Appeals On Any Constitutional Issue. The Only Issue On Which There Was Disagreement Below And The Only Issue Which Petitioner Is Seeking To Raise Here Is One Of Motion Practice.

(a) Petitioner's statement (see p. 6 of the petition herein) that

> "The Federal constitutional question in this case is accentuated by the clash in the prevailing and dissenting opinions. The word 'clash' is used without reservation. While no reference to the Fourteenth Amendment was made in the opinions, nevertheless, it is apparent from the opinions and the certificate of the Court of Appeals referred to at page 2, *supra*, that the constitutional propriety of the taking was the principal consideration and the only issue on which there were differences of opinion in the Court."

is contrary to the facts.

The Court of Appeals' discussion of the constitutional issues raised by petitioner's complaint and papers appears at pages 92 and 102 to 106, inclusive, of the record. As there appears, the majority and minority were in complete agreement on the constitutional issues—indeed those issues were discussed only in the minority opinion which stated that on this aspect of the case it was speaking in behalf of

the entire Court. The minority opinion thus said (R. 92, 100-106):

> "The basis for upholding the constitutionality of this statute (General Municipal Law, § 72-k), as outlined in this dissenting opinion, has been approved and adopted in the majority opinion written by Judge Desmond. (R. 92)
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> • • •
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> "As already indicated, I agree that section 72-k of the General Municipal Law is constitutional, in the respects in which it is attacked, and the views that follow reflect those of the entire court. (R. 102)
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> • • •
>
> "Section 72-k of the General Municipal Law is drawn upon the basis, upheld in *Matter of Murray* v. *LaGuardia,* that slum clearance is in itself a public purpose, which is separate and distinct from the objects to which the land may subsequently be devoted after being redeveloped by private capital. The State Constitution does not require that slums shall be rehabilitated exclusively by reconstruction for low cost housing, which is a different public purpose that may or may not be superimposed on slum clearance (*Matter of Murray* v. *LaGuardia, supra*). Consequently, except where an applicable statute requires, the slum area may be cleared, replanned, reconstructed and rehabilitated according to any design and for any purpose which renders the area no longer substandard or insanitary." (R. 103)

(b) The majority and minority below disagreed on one thing only and that was on a question of motion practice—whether summary judgment would lie here. In the majority's view, summary judgment was properly granted without a trial because (R. 89):

> "There is no real question of fact here since the details as to age, condition and present use of the properties involved are undisputed and indisputable, as shown by the exhibits."

The two minority judges, on the other hand, were of the opinion that the issues raised by petition should be determined by a trial and not on affidavits (R. 92-93). The dissenting opinion thus stated (R. 102):

> "By the Vladeck report and affidavits plaintiff has sustained whatever burden is upon him to come forward with evidentiary facts in opposing a motion for summary judgment, and also for the purpose of the motion, to rebut the [fol. 100] presumption of regularity of official acts. Sufficient has been shown to draw in question that the determinations of the committee, the city planning commission and the board of estimate respecting this slum clearance site, had warrant in the record and a reasonable basis in law (*Matter of Mounting & Finishing Co.* v. *McGoldrick*, 294 N. Y. 104, 108)."

(c) Petitioner's petition for writ of certiorari to this Court states (p. 6):

> ". . . the petitioner desires to inform this Court that no challenge is being made as to the constitutionality of Section 72-k of the General Municipal Law."

Petitioner's only contention in this Court is that the real purpose of the condemnation of the Columbus Circle Project was not slum clearance, but the erection of a coliseum and high priced apartment houses and that his claims in this connection should have been disposed of not by motion for summary judgment but after a trial. This contention, it is respectfully submitted, raises no constitutional issue, but only a question of practice as to the manner in which state courts should decide cases.

Petitioner on this application for certiorari has abandoned the only constitutional issues raised by him in his papers below. Petitioner below (see pp. 4 to 5, *supra*) contended only (i) that Section 72-k of the General Municipal Law and Article XVIII, Section 1, of the Constitution of the State of New York, insofar as they authorized the taking here, deprived him of his property without due

process and (ii) that the finding that the Project area is substandard and insanitary is arbitrary and capricious and therefore deprives him of his property without due process. These issues have been abandoned and are not advanced by petitioner in this Court.

III

There Is No Conflict Of Decisions.

Petitioner refers to *Schneider* v. *District of Columbia, et al.,* decided by a three-judge United States District Court for the District of Columbia on November 5, 1953 (unreported officially),* as being in conflict with the decision below. It is not.

In *Schneider,* two owners of property filed complaints challenging the constitutionality of the District of Columbia Redevelopment Act of 1945. The defendants there, government bodies and officials, made motions to dismiss or, in the alternative, for summary judgment. The three-judge Court granted the motion to dismiss.

In so doing, it stated, among other things:

> "We hold, therefore, that, so far as the District Redevelopment Act authorizes the condemnation of improvements upon land which are the creating or perpetuating causes of conditions injurious to the public health, safety, morals and welfare, as that term is used to describe breeding grounds for crime and disease, it is valid.
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> • • •

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* The opinion in the *Schneider* case is summarized and extracts therefrom are quoted in the United States Law Week, Nov. 10, 1953, 22 LW 2201-2202. We have read a copy of the opinion borrowed from The Bureau of National Affairs, and the statements and quotations, *infra,* in this brief are predicated on the opinion itself. We have not printed the opinion as an appendix to this brief because it is too lengthy; the copy which we borrowed was 42 pages (mimeographed, legal size) in length.

" . . . We hold that the necessity for the seizure of the title to a parcel of real estate involves facts and judgment, that these are essentially for the administrators, and that the function of the courts is limited to determining whether the conclusions of the administrators are within reason upon the record and within the congressional delegation of authority.

• • •

"Thus the utmost held by the recent redevelopment cases is that meeting a compelling community economic need is a public purpose. That is the doctrine of the early Supreme Court cases, such as *Fallbrook, Clark* v. *Nash,* and others, *supra.* We do not depart from the thesis of those decisions.*

• • •

"If property is seized for the purpose of eliminating or preventing slums within the limitations and in accordance with the rules we have described, *the fact that it may be sold subsequently to private persons does not vitiate the validity of the seizure.*" (Emphasis ours)

CONCLUSION

Petitioner, in essence, here contends only that he is entitled to a trial on oral testimony and that his contentions should not have been disposed of on motion for summary judgment.

The same type of contention was made to this Court in *Burt* v. *Pittsburgh, supra,* where the taxpayer contended that his complaint should not have been dismissed on its face and that he should have been granted a trial on oral testimony.

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* The redevelopment cases to which the *Schneider* opinion refers, sustaining the constitutionality of state statutes authorizing local public agencies to undertake urban redevelopment projects for slum clearance, are numerous. The opinion below, R. 104-105, collects and cites the cases.

Petitioner's said contention obviously raises no issue which merits the consideration of this Court.

The petition for writ of certiorari should be denied.

Respectfully submitted,

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February 19, 1954.

APPENDIX

Section 1 of Article XVIII of the Constitution of the State of New York reads as follows:

> "Subject to the provisions of this article, the legislature may provide in such manner, by such means and upon such terms and conditions as it may prescribe for low rent housing for persons of low income as defined by law, or for the clearance, replanning, reconstruction and rehabilitation of substandard and insanitary areas, or for both such purposes, and for recreational and other facilities incidental or appurtenant thereto."

Section 72-k of the General Municipal Law of the State of New York reads as follows:

§ 72-k. Acquisition of real property for clearance and rehabilitation; sale or lease of property for such purposes

1. The governing board or other appropriate authority of a municipal corporation may acquire by purchase, gift, devise, lease, condemnation or otherwise, in accordance with the provisions of any appropriate general, special, or local law applicable to the acquisition of real property by such municipal corporation, real property or any interest therein necessary for or incidental to the clearance, replanning, reconstruction, and neighborhood rehabilitation of substandard and insanitary areas, together with adequate provision for recreational and other facilities appurtenant thereto.

2. In addition to employing any other lawful method of utilizing or disposing of any real property or any interest therein owned by a municipal corporation, or acquired by it pursuant to subdivision one of this section, such municipal corporation, acting through its board of estimate or other governing body, may sell, lease for a term not exceeding ninety-nine years, or otherwise dispose of any such real property to any person, firm or corporation at the highest marketable price or rental at public

auction or by sealed bids pursuant to the provisions of any general, special or local law applicable to the sale or disposition of real property by such municipal corporation, for the purpose of clearance, replanning, reconstruction and neighborhood rehabilitation by the purchaser of such real property in substandard and insanitary areas, in such manner as may be prescribed by the board of estimate or other governing body. Any deed, lease or instrument by which real property or any interest therein is conveyed or disposed of in such manner shall contain provisions requiring the purchaser or grantee to clear, replan, reconstruct or rehabilitate such property in such manner as may be prescribed by the board of estimate or other governing body, and provisions insuring the use of such real property for purposes consistent with the clearance, replanning, reconstruction and neighborhood rehabilitation of substandard and insanitary areas. Such deed or instrument may contain such other provisions, conditions and restrictions, including specifications relating to clearance, replanning, reconstruction, and rehabilitation as may be prescribed by the board of estimate or other governing body. The prior consent of the city planning commission or other analogous body of such municipal corporation shall be required for the acquisition of property by such municipal corporation for the purposes of this subdivision, which prior consent shall be based upon a finding made by such city planning commission or other analogous body after a public hearing thereon, that such acquisition is necessary for the clearance, replanning, reconstruction and neighborhood rehabilitation of real property in a substandard and insanitary area.

3. In proceeding under this section in addition to all other powers which it may exercise, a municipal corporation, acting through its board of estimate or other governing body, may: (1) cooperate with the federal government and apply for and accept financial assistance, loans and grants, as provided in title I of the housing act of nineteen

forty-nine and all federal laws amendatory and supplemental thereto; (2) provide local grants-in-aid in the form of municipal services and facilities as provided under such federal laws; (3) contract with the federal government as provided under such federal laws including agreements to comply with (a) provisions requiring payment of not less than certain minimum salaries and wages to architects, engineers, technicians, laborers, mechanics and other personnel; (b) provisions prohibiting rebates and kick-backs; (c) provisions requiring contractors and subcontractors to furnish reports and other data to the secretary of labor; and (d) such other provisions, covenants, and conditions as the federal agency may deem necessary or desirable for effectuating the federal purposes; (4) issue bonds or other obligations for the acquisition of the property in the same manner as for the acquisition of property for other public purposes. The period of probable usefulness of such purpose is hereby determined to be fifteen years; (5) provide, in the discretion of the board of estimate or other local governing body, for clearance of the property by the municipality or by the person, firm or corporation to whom such property is sold or leased. In the event that clearance is provided by the municipality, the cost of such clearance shall be financed in the same manner as acquisition costs.